United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1077

United States Court of Appeals
FOR THE SECOND CIRCUIT

NO. 74-1077

CAPITAL TEMPORARIES, INC. OF HARTFORD,
CAPITAL TEMPORARIES, INC. OF NEW HAVEN,

and

CONSTANTINE T. ZESSOS,
Plaintiffs and Appellants

vs.

THE OLSTEN CORPORATION,
Defendant and Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE PLAINTIFFS-APPELLANTS

To be argued by:
RALPH C. DIXON, ESQ.
PHILIP S. WALKER, ESQ.

On the brief:
DAY, BERRY & HOWARD,
AUGUSTUS R. SOUTHWORTH III, ESQ.
Attorneys for Plaintiffs-Appellants
1 Constitution Plaza
Hartford, Connecticut

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

Preliminary Statement
Pursuant to Section 28,
Rules of the Court of Appeals
for the Second Circuit

The decision appealed from was rendered by the Honorable M. Joseph Blumenfeld, Chief Judge. The citation is *Capital Temporaries, Inc. of Hartford v. The Olsten Corporation*, 365 F. Supp. 888 (D. Conn. 1973).

TABLE OF CASES AND AUTHORITIES

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

I. Did the court err when it found no genuine issue of material fact and concluded that no tie-in existed?

II. Does a franchise contract which requires a franchisee to supply all services under the tied trademark license foreclose competition in the market for the supplying of such services?

III. Where a contract imposed through the exercise of economic power establishes a tying arrangement, affects a not insubstantial amount of interstate commerce, and forecloses competition in the market for the tied item, must a private antitrust plaintiff in addition prove the existence of overt conduct constituting "unlawful coercion" in order to establish a tying violation of the Sherman Act?

STATEMENT OF THE CASE

The plaintiffs originally brought this action against the defendant, The Olsten Corporation, and several individual defendants, in a complaint filed on November 24, 1971. The individual defendants were dropped as parties when the Amended Complaint dated January 26, 1972 was filed, leaving only the Olsten Corporation incorporated under the laws of the State of Delaware with its principal place of business in the State of New York, as a defendant. The Amended Complaint has formed the basis for all subsequent proceedings.

In this Amended Complaint the plaintiffs alleged several causes of action against the defendant arising out of a franchise relationship between them. Exhibit A to the Complaint is a copy of the franchise agreement executed on September 17, 1965 by the plaintiff, Constantine T. Zessos, and the defendant's predessor, Olsten U.S.A. Inc. (Pages A19-A34 in Appendix*) Amendments to the agreement were also annexed to the Amended Complaint as Exhibits B and C respectively. (A35-A44)

In brief, the plaintiffs made the following claims against the defendant:

FIRST COUNT: Breach of the franchise agreement by the defendant.

SECOND COUNT: Material misrepresentation and fraudulent concealment by the defendant in the discussions leading up to the agreement.

THIRD COUNT: Unfair competition and unfair or deceptive acts or practices by the defendant.

FOURTH COUNT: Abuse of process by the defendant in attaching the business records of the plaintiff, Capital Temporaries, in a state court civil action.

FIFTH COUNT: The defendant's breach of the antitrust laws by reason of an illegal tying arrangement wherein a

* All subsequent page references are to the Appendix unless otherwise indicated.

"blue collar" temporary services franchise ("Handy Andy") was tied to a "white collar" temporary services franchise ("Olstens").

SIXTH COUNT: Violation of the antitrust laws by the defendant by illegal price maintenance.

Jurisdiction is based on diversity of citizenship between the plaintiffs, citizens of Connecticut, and the defendant, a Delaware corporation having its principal place of business in New York. The matter in controversy exclusive of interests and costs exceeds $10,000. This action is also cognizable under, and jurisdiction is also founded on, the antitrust laws of the United States, 15 U.S.C. Section 1, 14, 15 and 22, and 28 U.S.C. Sections 2201 and 2202.

The defendant filed an Answer dated April 24, 1972 (A45), and later, a Counterclaim, subsequently denied by the plaintiffs.

On April 30, 1973 the defendant moved for a partial Summary Judgment as to the Fifth Count of the Amended Complaint, i.e., the count alleging an illegal tie-in of the white collar and blue collar franchises. (A71)

Under date of May 23, 1973 the plaintiffs themselves made a motion for partial Summary Judgment, on the issue of liability only, as to the tie-in claim alleged in the Fifth Count of the Amended Complaint. Said motion in essence claimed that the defendant, as a matter of law, had imposed a tie-in, illegal *per se*, under Section 1 of the Sherman Act. (A305)

Both motions were heard on oral argument on June 25, 1973 before the Honorable M. Joseph Blumenfeld. In a ruling dated October 10, 1973, Judge Blumenfeld denied the plaintiffs' motion and granted the defendant's motion for Summary Judgment. (A358) Pursuant to that ruling, partial Summary Judgment was entered dismissing Count Five. (A374)

Thereafter, on October 25, 1973 the plaintiffs moved to alter or amend the judgment under FRCP 59(e) to include a statement pursuant to Title 28 U.S.C. Section 1292(b) that

such order involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation. (A375)

After oral argument, in a supplemental memorandum dated December 4, 1973 (A376), Judge Blumenfeld ruled that the judgment include such a statement pursuant to 28 U.S.C. Section 1292(b) and on December 13, 1973, an amended partial Summary Judgment was entered containing such statement. (A378)

Under date of December 21, 1973 a petition was filed with this Court for permission to appeal under 28 U.S.C. Section 1292(b). That petition was granted by this Court on January 9, 1974.

STATEMENT OF FACTS

At all times relevant hereto, the defendant, The Olsten Corporation, (hereinafter sometimes referred to as "Olsten") and its predecessors, have been engaged in the business of providing temporary employment personnel and franchising others to engage in such business. (A19) It owns several federally registered trademarks which it uses in its business. The mark "Olstens" is used in connection with the temporary office personnel or "white collar" business; the mark "Handy Andy" relates to the temporary industrial or "blue collar" business. (See Exhibits to Zessos affidavit, A337-A345)

Olsten has, by its own assertion, used these marks in connection with its business throughout the United States and Canada. (See Olsten affidavit, A72-A73; and Olsten complaint in related action, A320-A323)

In 1965, the plaintiff, Constantine T. Zessos, was solicited by the defendant's controller, to become a franchisee. (See Zessos affidavit, A307) He had never heard of the defendant corporation before that time and had no prior interest in or knowledge of the temporary personnel business. (Id., also see Zessos deposition, A105) His prior business experience consisted of working as a salesman for a business machine company and two printing concerns. (Zessos deposition, A97-A104)

On September 17, 1965, Zessos signed a franchise agreement with the defendant which licensed him to use the trademark and names "Olsten's" and "Handy Andy Labor", in white collar and blue collar operations respectively, in Hartford and Middlesex counties in Connecticut as the defendant's franchisee and licensee ". . . so long as the licensee observes and performs all the terms and covenants and conditions of this agreement". (A19-A34)

During the period culminating in the agreement of September 17, 1965, the Olsten "white collar" franchise and the Handy Andy "blue collar" franchise were offered to the plaintiff, Zessos, only as a package. He was never given an

opportunity to accept one without the other. (Zessos deposition, A197-A198; and his affidavit, A307)

In paragraph 2, the franchise agreement imposed the following requirement:

> ". . . All 'blue collar' personnel shall be supplied by a division of the licensee designated as HANDY ANDY LABOR commencing six months from the date hereof. For the purpose of standards and rate of franchise fee, the total of all billings from whatever source shall be included . . . Separate bookkeeping shall be kept for the 'blue collar' division. . . .". (A20)

The agreement in paragraph 3 established a license fee in the sum of $6,000 "as a charge for the franchise which licenses the use of the trade name, trademark, various techniques and systems . . .". (A20) Nowhere is there a breakdown of this charge between the white collar and blue collar franchises and nowhere is there the slightest indication that these were offered separately to the plaintiffs. As far as the operation of the two businesses is concerned, however, the franchise agreement is quite specific, requiring a separate division, a separate name and separate bookkeeping. (Paragraph 2, at A20)

In addition to the initial license fee, the franchise agreement provided for franchise fees computed at five percent of gross billings for *both* the white collar and the blue collar operations payable to Olsten. (Paragraphs 2 and 4, A20-A21)

Paragraph 25 of the agreement, the "non-competitive clause", required the plaintiffs to "refrain from engaging in any activities that might compete in any manner directly or indirectly with the operation of temporary office personnel business." (A31)

The "restrictive covenant" found in paragraph 26 provided that if the agreement terminated for any reasons whatsoever, the plaintiffs could not enter into a white collar or blue collar business, directly or indirectly, within a radius of 100 miles from Hartford and Middlesex Counties (and by the rider, New Haven County) and 50 miles from

any office bearing the Olsten name and trademark for a period of one year. The restrictive covenant goes on to read "similar business shall include the providing of personnel whether temporary or permanent with or without fee." (A31-A32)

The rider to this agreement added paragraphs 35 and 36 extending the territory of the license to New Haven County under certain conditions and breaking down the $6,000 license fee to allocate $2,500 of this amount to the New Haven operation. (A43-A44)

The plaintiff, Zessos, as provided in the franchise agreement, effected the incorporation of three Connecticut corporations. These were Olsten's of Hartford County, Inc.; Olsten's of New Haven County, Inc.; and Handy Andy Labor of New Haven, Inc. Of these corporations, the first and second named carried on the business of supplying "white collar" temporary personnel in Hartford and New Haven (The names of these corporations, plaintiffs herein, were changed on November 1, 1971 to Capital Temporaries, Inc. of Hartford and Capital Temporaries, Inc. of New Haven, respectively.) Handy Andy of New Haven, Inc., during the period of time in which it was an active corporation, was in the blue collar business in New Haven. Paragraph 5 of complaint, A9; admitted in Answer, A45)

The capital investment for each of these companies was made exclusively by the plaintiff, Zessos. The defendant Olsten never made any investment or held any equity position in them. (Paragraph 6 of Answer, A45; Zessos affidavit, A310)

In accordance with the agreement of September 17, 1965, the plaintiffs alone were responsible for the payment of all salaries and wages or other compensation to employees, and for the payment of any and all taxes. They, and not the defendant, Olsten, had to maintain all insurance and to pay the overhead of the offices. All temporary personnel who were sent out by all offices were obtained by and paid by the plaintiffs. All customers for all offices were solicited by,

and their accounts maintained, by the efforts of the plaintiffs. (Zessos affidavit, A310)

Mr. Zessos did not open a Handy Andy office within the six-month period specified in the agreement of September 17, 1965 although he did open Olsten white collar offices first in Hartford and then in New Haven. (Zessos deposition, A128 and A136) In 1968 and 1969, he negotiated the August 1969 amendment with Olsten. In connection with these negotiations, Mr. Zessos's then attorney, John Poulos, pointed out in a letter of May 6, 1968 that "Handy Andy Labor should have been commenced in March of 1966. You should extend the date or have it eliminated . . .". "You should get a waiver concerning your failure to open Handy Andy in New Haven within the allowed time." (Exhibit to Helweil affidavit, A85) At that time, as a result of discussions with Mr. Olsten, then the defendant's president, Mr. Zessos was under the impression that he had an informal understanding with reference to Handy Andy that there would be no license fee and no time limit on when the Handy Andy operation would commence. (Paragraph 10, Zessos affidavit, A308) However, thereafter, Mr. Olsten insisted that a new time limit be incorporated in the amendment to the agreement (again prepared by the defendant) providing that "the licensee's time to open Handy Andy offices in Hartford and New Haven is extended to December 31, 1969." (Amendment, A43-A44; paragraph 11, Zessos affidavit, A308) Although, for business reasons, Mr. Zessos did not want to open a Handy Andy office during the time period 1968-1969, Mr. Olsten insisted that Mr. Zessos do so because it was "in" the franchise agreement. (Zessos deposition, A141 and A198) Mr. Zessos subsequently opened a Handy Andy office in New Haven in September 1969. (Zessos affidavit, A310) In spite of Olsten projections that the New Haven Handy Andy operation would reach over $450,000 per year in gross billings, the volume fell far short of this and the operation was terminated because of unprofitability in June of 1971. (Id., A309-A310)

The customers serviced by the Handy Andy office in New Haven included almost entirely companies involved in interstate commerce. (Id., A309) The New Haven temporary services market was also served by affiliates of three national competitors of Olsten, Kelly Labor Division, Manpower and Staff Builders. (Id., A309; and memorandum of the defendant's Handy Andy "National Sales Manager" annexed thereto as an Exhibit, A316-A317)

The contract between the parties expired on October 29, 1970. However, thereafter the plaintiffs continued to operate as franchisees of Olsten and continued to pay franchise fees. Moreover, the parties continued to negotiate a possible new agreement, the last proposal by Olsten in this matter being contained in a letter from its President, Alec Faberman, dated April 8, 1971, proposing that there be a five percent franchise fee for the rest of Zessos's natural life. This proposal was understandably unacceptable to the plaintiffs and never agreed to by them. (Zessos affidavit, A311-A312)

On November 1, 1971 the plaintiffs ceased any business whatsoever under the Olsten trademark, changing their corporate names to their present appellations. (Id., A311)

ARGUMENT

I

INTRODUCTION

This appeal concerns itself with the appropriateness of the summary judgment remedy as applied to a cause of action claiming a tie-in violative of Section 1 of the Sherman Act. Both parties filed summary judgment motions below on the count in question. The plaintiffs claimed in Count 5 that a tie-in of a "blue collar" franchise with a "white collar" franchise in the contract between the parties, was illegal per se under the holding of such cases as *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495 (1969) and *Northern Pac. R.R. Co. v. U.S.*, 356 U.S. 1 (1958). The plaintiffs' motion was denied by the district court in the same ruling which granted the defendant's motion by holding "there existed no tie-in between the white collar and the blue collar franchises."

As its ruling on the cross-motions made clear, the court below acted on both motions on the basis of its conclusion that the plaintiffs were not "coerced" into actually starting up and operating under the alleged tied product, to wit: the blue collar Handy Andy license; hence there was no illegal tie-in. The court disposed of the plaintiffs' motion for summary judgment by stating: "I conclude from the evidence presented by both parties in form of affidavits and depositions that it is beyond factual dispute that the defendant never exerted any economic power to compel the plaintiff to operate its blue collar employment service franchise." 365 F. Supp. at 894-895. In granting the defendant's summary judgment motion the court stated "I find, therefore, that the white-collar and blue-collar franchises were entirely separate operations; that the plaintiff was never compelled to operate the latter in order to obtain the former; that he received the right to use the Handy Andy trademark along with his purchase of the Olsten franchise without payment of additional consideration . . . I hold that Zessos was in

no way obligated to enter the blue-collar industry and that his only obligation under the contract was to fulfill its condition with respect to the Olsten's white-collar franchise." 365 F. Supp. 895-896.

The plaintiffs claim that the court below erred both in concluding that they must demonstrate actual coercion to set up operations under the tied item, and, assuming arguendo, such "coercion" was an indispensable element in the plaintiffs' cause of action, that no genuine issue of fact existed concerning the presence of this element.

In addition to introducing this additional tie-in element, the district court in its ruling on the cross-motions for summary judgment did not deal at all with the significant claim of market foreclosure raised by the plaintiffs. The franchise agreement imposed by the defendant restricted the plaintiffs from operating any blue collar business other than under the Handy Andy mark. They were therefore foreclosed from establishing their own blue collar operation or from entering into an agreement with a competitor of the defendant, for example, Manpower or Kelly.

This foreclosure question was the central issue raised in the plaintiffs' petition to this court to allow this appeal. While the court below rested its decision on the purported absence of actual coercion outside of the agreement, it did amend the judgment, after motion by the plaintiffs, to include a statement pursuant to 28 U.S.C. Section 1292(b) that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion. . .".

II

WHERE THE TYING ITEM IS A TRADEMARK, DERIVING ITS ECONOMIC POWER FROM FORCE OF LAW, ACTUAL COERCION, OUTSIDE THE FRANCHISE CONTRACT, IS UNNECESSARY TO ESTABLISH A VIOLATION OF THE SHERMAN ACT.

A. Tying arrangements are proscribed by the antitrust laws because of their use of market power to foreclose competition in the market for the tied item.

The Sherman Act tying cases have established that the primary reason for the prohibition of tying arrangements is that they foreclose competition in the market for the tied item and in so doing restrain trade. *International Salt Co. v. U.S.*, 332 U.S. 392, 396 (1947). This was recognized by the district court when it defined a tying arrangement, following the Supreme Court in *Northern Pacific R.R. Co. v. U.S.*, 356 U.S. 1, 5-6 (1958):

> "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier*." (Emphasis supplied)

See 365 F. Supp. 888, 891-92 (1973) in the instant case. The district court adopted this definition of a tying arrangement but did not go on to consider the rationale for this prohibition set forth thereafter in *Northern Pacific:*

> "They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. *At the same time buyers are forced to forego their free choice between competing products.*" 356 U.S. at 6. (Emphasis supplied)

The status of the law with respect to tie-ins after *Fortner* has been described as follows:

> "But the principal evil at which the [tie-in] doctrine is aimed is the use of tying arrangements to deny com-

petitors free access to the market for the tied product." Note, The Logic of Foreclosure, 79 Yale L.J. 86, 92 (1969)

This represents a consistent theme running through the law of tie-ins. The presence of market foreclosure compels a finding of a restraint of trade in all but those rare instances where the business justification exists.[1] This foreclosure, however, goes unmentioned in the opinion of the court below in its pursuit of the "coercion" issue. While the presence or absence of the latter was deemed conclusive, the principal abuse of market foreclosure is tolerated.

The market foreclosure, which was the intentional and inevitable result of the Handy Andy tie-in clause, has been held in closely analogous circumstances to constitute a restraint of trade in violation of Sherman 1. In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D.N.J., 1973), the court examined the effect of the "non-Holiday Inn" clause imposed in the franchise agreement[2] and concluded that it was the intended effect "of reducing and preventing competition among Holiday Inns franchises and between franchised inns and company-owned inns." *Id.* at 1094. The court further pointed out that "The harm flowing from the non-Holiday Inn clause is the foreclosure of all hostelers competing with HI from doing business with all HI franchisees." *Id.* The plaintiffs here contend that the restriction of competition by Olsten's competitors who were foreclosed from doing business in the blue collar field with the plaintiffs was the real and intended effect of this franchise contract. As the *American Motor Inns* court stated: [E]ven otherwise reasonable trade arrangements must fail if conceived to achieve forbidden

[1] See Comment, *Franchise Tie-ins and Antitrust: A Critical Analysis*, 73 Wisc. L. R. 847, 864-869 (1973)

[2] *American Motor Inns* was decided at approximately the same time as the district court ruling in the instant case. It provides further support to the court's supplemental memorandum stating that this judgement "involves a controlling question as to which there is a substantial ground for difference of opinion. . . ." (A376)

ends". *Id.* at p. 1094, quoting *Times-Picayune v. United States*, 345 U.S. 594, 614, 622 (1953).

B. The tying arrangement of the white and blue collar franchises imposed by the Olsten franchise contract foreclosed competition in the market for the tied item.

The market competitors foreclosed by Olsten for the blue collar business included not only Olsten's franchisor competitors, but also the plaintiffs themselves who were unable to enter the blue collar business other than as dictated by the arrangement with Olsten.

Foreclosure of the market in the tied item is fundamental to tying cases. In spite of the plaintiffs' allegation of foreclosures in the complaint (see in particular the second clause of paragraph 41 at A16) denied by the defendant but uncontradicted by affidavit, and the contractual requirement imposed upon the plaintiffs that "All 'blue collar' personnel shall be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR. . .", the district court did not consider the foreclosure issue at all in its ruling.

It is the restraint of trade in the market for the tied item which is the prohibited result of an illegal tying arrangement. The Sherman Act prohibits tie-ins in order to prevent sellers with economic power from restricting buyers' decisions in the market for the tied item.[3] By the terms of the franchise agreement, the defendant restricted the plaintiffs' decisions in the market for blue collar employment services.

C. The court below improperly added an "unlawful coercion" requirement to the elements comprising a tying arrangement illegal under the antitrust laws.

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[3] "Apparently the courts are not so much concerned with the economic injury a franchisee may suffer as a result of the tie-in in the form of higher prices as they are with the fact that the business decisions of franchises are restricted." Comment, *Franchise Tie-Ins and Antitrust: A Critical Analysis*, 1973 Wis. L.R. 847, 871 n.180 (1973).

1. The Traditional Elements of an Illegal *Per Se* Tying Arrangement Find Support in the Record.

A tying arrangement is *per se* illegal under the Sherman Act if there are two distinct and separate items; the sale of one (the tied product) is tied to the sale of the other (the tying product); the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and a not insubstantial amount of interstate commerce in the tied product is affected by the tying arrangement. *Fortner Enterprises Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 497 (1969). *Northern Pac. R.R. Co. v. United States*, 356 U.S. at 5-7 (1958). The record, as set forth in the Appendix, shows that each of these elements is supported in the affidavits and other documentary evidence filed in support of or in opposition to the cross-motions for summary judgment. Moreover, the record is virtually uncontroverted by evidence to the contrary.

In this case, both the tying (white collar franchise) and the tied (blue collar franchise) items are trademark or franchise licenses. There is ample authority for the proposition that the license to use a name, trademark and method of operations is "a tying item in the traditional sense." *Siegel v. Chicken Delight*, 311 F. Supp. 847, 849 (N.D. Cal. 1970), aff'd on liability and reversed on the issue of damages, 448 F.2d 43 (9th Cir. 1971), cert. den. 405 U.S. 955 (1972). *Siegel* was cited with approval by the court below 365 F. Supp. at 892. There is certainly no conceptual reason why such a license should not be a tied item as well.

Evidence of the actual tying of these two items is found in the contract which links these two distinct licenses. The September 17, 1965 agreement provided that Olsten, as franchisor and licensor, granted to Mr. Zessos as franchisee and licensee "the exclusive and nontransferable license:

1. "to use the trade name and trademark OLSTEN'S. . .";

2. "to use the trade name and trademark HANDY ANDY LABOR . . ."

. . . so long as the licensee observes and performs all of the terms, covenants and conditions of this agreement." (A20)

These "grants", coupled in the franchise agreement, and subject to "all of the terms, covenants and conditions" thereof constitute a classic tie-in under *Northern Pacific*.[4]

Further substantiation of the imposition of this tying arrangement is found in the affidavit of Mr. Zessos wherein he states:

"5. That during the course of the negotiations leading up to the agreement of September 17, 1965 which I executed with the defendant, the Olsten 'white collar' franchise and the Handy Andy 'blue collar' franchise were always offered as a package and I was never given an opportunity to accept one without the other." (A307)

While indeed the defendant has asserted that it has "allowed" franchisees to operate either blue collar or white collar franchises without the other (Olsten affidavit, paragraphs 27 and 28, A76), and allegedly did not "require" Mr. Zessos to *purchase* a blue collar franchise in order to obtain

[4] The franchise agreement required, in paragraph 2, that all blue collar labor supplied by Zessos "shall" be provided under the "Handy Andy" trademark and license. The "non-competitive clause" set forth in paragraph 25 that the licensee "shall use his best efforts to promote and advance his business and shall refrain from engaging in any activities that might compete in any manner directly or indirectly with the operation of temporary office personnel business" directly supports the plaintiffs' claim that they were precluded from entering the temporary blue collar personnel business on terms other than those dictated by Olsten Corporation—i.e., under the "Handy Andy" mark. The binding nature of this requirement is underlined by the "restrictive covenant" provision of paragraph 26 which provides that if the agreement terminated for any reasons whatsoever, the plaintiffs could not enter into a white collar or blue collar business, directly or indirectly, within a radius of 100 miles from Hartford and Middlesex Counties (and by the rider, New Haven County) or 50 miles from any office bearing the Olsten name and trademark for a period of one year. The restrictive covenant goes on to read "similar business shall include the providing of personnel whether temporary or permanent with or without fee." Further, as part of this restrictive covenant, Olsten imposed the following upon the plaintiffs: "In any instance, the LICENSEE consents to injunctive relief without restricting the LICENSOR from demanding damages or any further and different relief as may be available. (A20, A31-A32) Needless to say, the contract did not contain reciprocal provisions protecting the franchisee plaintiffs.

a white collar franchise (Id., paragraph 25, A76), it has never contradicted the extract cited above from the sworn affidavit of Mr. Zessos. The defendant has never denied that the two were offered in this instance only as a package and rests its claim that it did not require the blue collar franchise to be "purchased" on the assertion that there was no separate front-end franchise fee for Handy Andy. (Id., paragraph 29, A77) Thus the defendant characterizes the tied item as a "gift" rather than a "purchase".[5] Its position, however, is not devoid of sophistry inasmuch as the franchise agreement obligated Mr. Zessos to pay the defendant five percent of all gross earnings from the tied Handy Andy business. (Agreement, paragraphs 2 and 4, A20-A21)

With regard to the requirement that the defendant have enough economic leverage in the market for the tying white collar franchise to induce the franchisee to take the tied blue collar franchise along with the former, this is made manifest by the characterization of the extent of the Olsten business in the affidavit of Mr. Olsten (A72-A73), by the claim set forth in a complaint in a separate case brought by the defendant against the plaintiff (A320-A323), and by the attachments to that complaint setting forth the great number of trademark and service mark registrations which Olsten has obtained both for its white collar and for its blue collar business in Canada as well as the United States (A337-A345). Where the tying product is patented, copyrighted or trademarked, sufficient economic power is to be presumed. *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *Siegel, supra*, 448 F.2d at 50.

The only remaining element necessary to support the finding of a *per se* violation is that "a not insubstantial amount of interstate commerce in the tied item is affected by the tying arrangement." The focus of the inquiry in this regard is set forth in *Fortner Enterprises, supra*, 394 U.S. 495, 501 (1969) as follows:

[5] See, for example, page 16 of the brief filed by the defendant with the court below in support of its motion for Summary Judgment dated April 30, 1973.

". . . normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie, for as we said in *International Salt*, it is 'unreasonable, *per se*, to foreclose competitors from any substantial market' by a tying arrangement." 332 U.S., at 396.

In *Fortner*, it was held as a matter of law that $190,000 in annual sales involved in the tying arrangement satisfied this economic requirement. "We cannot agree with respondents that a sum of almost $200,000 is paltry or 'insubstantial'". Id. 502. The gross billings of the New Haven Handy Andy office which was opened in New Haven amounted to over $73,000 just in the nine months of its existence. (A310) A memorandum to the plaintiff, Zessos, from the defendant projected that the New Haven operation had a potential of 3,500 billing hours per week. (A316a) Olsten clearly views "Handy Andy" as a national system. Obviously, even figuring the gross billings at a minimal wage level, Olsten projected a market of several hundred thousand dollars in billings per year, exceeding the dollar amount involved in *Fortner*. Finally, the defendant, itself, estimated the gross billings of a blue collar competitor in New Haven (Manpower) to be far in excess of the *Fortner* "not insubstantial" amount. (A318)

The plaintiffs submit there was clearly support in the record for each of the elements which together establish Olsten's tying of the white collar and the blue collar franchises as illegal under the Sherman Act.

2. The Cases Relied on by the District Court do not Support the Additional "Unlawful Coercion" Requirement.

The decision of the district court correctly relied on *Northern Pac. R.R. Co. v. United States* to describe the circumstances under which a tie-in arrangement is illegal *per se* under Sherman 1. However, *Fortner* is then cited for the proposition that, concerning the third element, "the mere existence of economic power in a seller is [not] enough . . .

to establish the illegality of a tie-in." 365 F. Supp. at 892. The court then singled out the element it considered lacking in the franchising arrangement between the immediate parties:

> "The economic power must not simply exist; it must be used. [T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice. *Amer. Mfrs. Mut. Ins. Co. v. Amer. B-P Theatres*, 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063, 92 S. Ct. 737, 30 L. Ed. 2d 752 (1972)." 365 F. Supp. at 892.

Two additional cases, *Belliston v. Texaco, Inc.*, 455 F.2d 175, 183-184 (10th Cir. 1972), and *Abercrombie v. Lums, Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972) were then cited in support of this "unlawful coercion" requirement. The court below was of the opinion that such "unlawful coercion" was not present and denied plaintiff's motion for summary judgment:

> "To prevail in his motion for summary judgment, Zessos must establish that Olsten exploited its economic power to compel him, contrary to his wishes, to open a Handy Andy office. Since the record is barren of evidence to support such a finding, the plaintiff's motion for summary judgment must be, and is hereby, denied." 365 F. Supp. at 895.

The plaintiffs submit that this analysis represents an inaccurate statement of antitrust tie-in principles; that no such inflexible requirement of "unlawful coercion" exists; and that the cases relied upon are distinguishable from the instant case and do not impose an "unlawful coercion" requirement on these facts. A review of the analysis set forth in the opinion below supports this conclusion.

It should first be noted that *Fortner* is not cited for the affirmative proposition that economic power must be used and that such use must take the form of "unlawful coercion." Rather, *Fortner* is cited for a "negative" holding: ". . . *Fortner* does not hold that the mere existence of economic power in a seller is enough to meet the first criterion . . ." 365 F. Supp. at 892. Plaintiffs submit that *Fortner* does "not hold" many propositions concerning illegal tie-ins, and

that this does not constitute authority for requiring plaintiff to prove the converse.

On the question of "economic power" *Fortner's* statement is clear and straightforward: "market dominance" in a tying item need not be established; such power may be manifested by an ability to raise prices, impose tie-ins, or offer unique financing terms with respect to an appreciable number of buyers. 394 U.S. at 503, 504. Nowhere is a requirement of "unlawful coercion", as used here by the district court, imposed or even suggested in *Fortner*. A review of the principles set forth in *Fortner* reveals that the plaintiffs have, in fact, met its requirements. See *Section III C 1 supra*

Precedent for the "unlawful coercion" requirement was claimed to be found in *Amer. Mfrs. Mut. Ins. Co. v. Amer. B-P Theatres*, 446 F.2d 1131 (2d Cir. 1971). Therein, the statement that an illegal tie-in requires unlawful coercion of the buyer does appear, 446 F.2d at 1137. However, that statement must be considered of doubtful utility in the instant case. Factually the two cases are widely disparate: *American Manufacturers* involved two parties of relatively equal bargaining strength, and a long series of negotiations during which the defendant made substantial concessions to the plaintiff in order to induce the latter's "purchase" of advertising time. *Id.*, at 1136. No evidence of either negotiations or concessions is present here; rather Zessos was offered the contract tying together two distinct franchise licenses for two federally registered trademarks on a "take it or leave it" basis. (A197-A198, A307) Furthermore, American Manufacturers involved the purchase of one product (advertising time) in a large number of market areas, some of which plaintiff claimed were less desirable than others but were "tied" to the "purchase" of the more desirable markets. This bears little resemblance to the contractual requirement imposed by Olsten that as part of his purchase of a white collar franchise plaintiff must also operate a blue collar franchise and refrain from offering temporary blue collar employment services other than

through the Olsten owned Handy Andy franchise. *American Manufacturers* had no comparable contract term or foreclosure element. Lastly, it should be noted that this court in *American Manufacturers* considered it significant that the price of the "package" offered to Kemper remained essentially the same, regardless of the presence or absence of "undesirable" markets (*Id.* at 1135). By contrast, the tying aspect here is emphasized by the requirement that in addition to the fees generated by the tying white collar franchise, fees on the tied item had to be paid Olsten under the contract based on a percentage of Handy-Andy gross billings. (Paragraph 6 at A21)

Reliance on *American Manufacturers* is ill-advised for reasons in addition to the factual distinctions present in the instant case, however. It is submitted that the district court did not consider the circumstances of the holding in *American Manufacturers* and in so doing raised an unnecessary requirement of proof for the present plaintiff.

American Manufacturers held that there was no evidence that ABC applied any pressure of any kind as part of the precontract negotiations to influence Kemper's decision to contract for the package of television markets. 446 F.2d at 1137. The buyers' choice was not unlawfully coerced, and therefore the resulting contract between Kemper and ABC did not embody an illegal tie. *Id.* In the instant case, the court below isolated a single "fact" it found convincing which occurred well *after* the contract was signed and in effect to conclude that a tying arrangement did not exist. That "fact" is a claimed absence of evidence that "Zessos was in any way coerced or compelled to open a Handy Andy office." 365 F. Supp. at 894. *American Manufacturers* held that an absence of unlawful coercion during precontract negotiations precluded a tie-in under the fact situation therein presented. The court below used this as precedent in determining the question of whether a tie-in existed initially, by examining whether the seller coerced the buyer into operating the tied item at a *later* time. *Id.* at 893, 894. The seller's failure to attempt this, or perhaps even an attempt

by him which proves unsuccessful, therefore precludes finding an illegal tie-in under this rationale. *American Manufacturers* will not support this proposition. As a rule of antitrust law it would mean that the most blatent tying contract would be safe from challenge (and in fact would not constitute a tie-in) until "unlawful coercion" was exercised by the seller and the buyer responded directly to that "unlawful coercion" by purchasing the tied product. Further, it would mean that a buyer's acquiescence based on a perceived legal obligation arising out of the contract he has signed, and not in response to "unlawful coercion," would render the tie-in invulnerable to antitrust challenge. Finally, it would mean that unless "unlawful coercion" was in fact exercised to require the buyer actually to purchase the tied product from the seller, the foreclosure from dealing with others in the market for the tied product could not be remedied. Plaintiffs do not believe this to be the state of antitrust law, nor an accurate application of *American Manufacturers.*

Reliance upon *Belliston v. Texaco, Inc., supra,* and *Abercrombie v. Lum's, Inc., supra,* is similarly deficient.

Abercrombie involved a ruling on whether a suit brought on behalf of franchisees against their franchisor could proceed as a class action. En route to determining the class action question, the court considered the evidence requisite to establishing an illegal tie-in:

> "Evidence of such arrangements could be shown (a) by proof of contractual obligations imposed in the franchise agreements, *or* (b) by proof that the franchisee was required through his dealings with the seller, extrinsic to any express agreement to purchase an unwanted product. 345 F. Supp. at 390. (Emphasis added)

Evidence of the imposition of requirements, extrinsic to the contract, was *one* method seen by the *Abercrombie* court to prove a tie-in. However, proof of pressure extrinsic to the contract is presented only as an alternative if the language of the contract did not impose the obligation of purchasing

the tied item from the franchisor or refraining from purchasing it from competitors.

Belliston is wholly inapposite. There, certain service station dealers claimed tying arrangements based on alleged requests to the dealers to purchase specific TBA. No claim or reliance was placed on the franchise agreement or any other contract between Texaco and its dealers.[6] This situation is covered by the second alternative in *Abercrombie*, where, absent a contractually imposed tie-in, coercion may be required. Moreover, neither *Belliston* nor *Abercrombie* support the post-contract "unlawful coercion" requirement.

Any such "rule" disregards basic antitrust principles and policies; by preventing a finding of illegality unless and until an exercise of "unlawful coercion" results in attainment of the illegal object of the tie, the district court would emasculate the Sherman Act's preventive effect. The Supreme Court recognized this in the landmark case of *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940):

> "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which §1 of the Sherman Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *Id.* at 225, fn. 59.

The plaintiffs submit that this interpretation of Section 1 of the Sherman Act applies equally to the tying arrangement attempted by Olsten as it does to the price-fixing effort at issue in *Socony-Vacuum*.

D. Economic power is presumed where the tying item is a franchise trademark.

The Supreme Court has never held that coercion is necessary to establish an unlawful tie-in under the Sherman Act where the tying item derives its market power from the force of law. Thus, where the tying item is patented, *International Salt Co. v. U.S.*, 332 U.S. 392 (1947) or copyrighted,

[6] Reference is made in *Belliston* to a "commission arrangement" between Texaco and TB manufacturers; the dealers appear *not* to have been parties to those agreements. See also *Advance Bus. Syst. v. SCM*, 415 F.2d 55, 62, 66 (4th Cir. 1969) for a recognition and discussion of the relationship between "coercive tie-ins" and those imposed by contract.

U.S. v. Loew's, Inc., 371 U.S. 38 (1962) market power in the tying item is presumed. As the court below recognized, requisite economic power is now presumed from the existence of a trademark or franchise license as well. 365 F. Supp. at 892.

In *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971) cert. denied 405 U.S. 955 (1972) the Ninth Circuit explicitly extended the presumption of market power to a trademark where the trademark is the tying item:

> "Just as the patent or copyright forecloses competitors from offering the distinctive product on the market, so the registered trademark presents a legal barrier against competition. It is not the nature of the public interest that has caused the legal barrier to be erected that is the basis for the presumption, but the fact that such a barrier does exist. Accordingly we see no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark." 448 F.2d at 50.

Under the *Siegel* rule, there is a *presumption* that sufficient economic power is operating when the tying item is the license of a federally registered trademark. Other Circuits are in accord: *e.g., Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1012-16 (5th Cir. 1972); *Seligson v. Plum Tree, Inc.*, 361 F. Supp. 748, 753 (E.D.Pa. 1973) *vacated* on issue of classification — F.2d — (3d Cir. 12/20/73), *Falls Church Bratwursthaus, Inc. v. Bratwursthaus Mgmt. Corp.*, 354 F. Supp. 1237, 1240 (E.D. Va. 1973).

The district court recognized that a trademark franchise creates a presumption of economic power in the tying item. 365 F. Supp. at 892. Having recognized this presumption, however, the court nullified it by adding the further requirement that economic power is not established in the first instance without demonstrating its overt "use". This "use" is narrowly defined to include only instances where actual and overt coercion is directed against the franchisee to force him into *operating* under the tied blue collar franchise and mark.

The district court's requirement for such overt "coercion" after the execution of the contract embodying the tying arrangement in order to establish economic power in the franchise trademark imposes an additional burden upon private plaintiffs in tying cases not contemplated by the Sherman Act. Not only may it be difficult in many tying cases to prove that the defendant has overtly "coerced" the plaintiff into accepting the tied product, but establishing such coercion will result in complex and time-consuming judicial proceedings which the Supreme Court sought to avoid with the *per se* rule. *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958). *U.S. v. Topco Associates*, 405 U.S. 596 (1972). The new requirement of "coercion" undermines the presumption of economic power which operates when the tying item is the license of a registered trademark.

Moreover, the new requirement of "overt coercion" reverses the trend evidenced in *Fortner* away from the discredited "market dominance" test. 394 U.S. 495, 502-503 (1968). Quoting *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the *Fortner* court reaffirmed that "economic power" may be inferred from a showing of a product's desirability. *Id.* at 503. This cannot be reconciled with a requirement that an affirmative showing of the coercive use of economic power be made. Further, a narrow focus on "coercion" disregards the market foreclosure which results from the contract.

E. Coercion is not required because the buyer's motive in taking the tied item is irrelevant to the existence of the tie.

The district court held that "[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice." 365 F. Supp. at 892. First of all, this buyer had no choice. Both franchises were presented only as a package. (A197-A198, A307) Secondly, where the tie-in is contractually imposed, the presence or absence of coercion is irrelevant to the existence of an illegal-tie-in. Coercion assumes a lack of free will. In fact, the buyer's state of mind in accepting the tied item is irrelevant, and acquiescence or

even participation in the creation of the illegal tying arrangement does not prove or disprove its existence. In *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134 (1968) the Supreme Court held that *in pari delicto* was not a defense to a private antitrust action. *Perma Life* bears substantial similarity to the instant case, particularly on the question of the relevance of the buyer's state of mind.

The plaintiffs in *Perma Life* were franchised Midas Muffler dealers who challenged the tying of certain automotive parts to the more desirable "Midas Mufflers". The Court of Appeals had affirmed a summary judgment dismissing the plaintiff's complaint, including *inter alia,* a tying claim which had been dismissed on the grounds of *in pari delicto.* The defendants argued that plaintiffs were barred from recovery on the ground that they not only had sought their franchises with knowledge of the challenged franchise terms, but also they had enjoyed profits as dealers and even sought to acquire additional franchises.

> "Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge." 392 U.S. at 138.

The Supreme Court reversed. It held that the important public purpose served by private plaintiffs enforcing the antitrust laws would be frustrated if the *in pari delicto* defense were applicable:

> "We therefore hold that the doctrine of *in pari delicto,* with its complex scope, contents, and effects is not to be recognized as a defense to an antitrust action. 392 U.S. at 140.

The public policy consideration which resulted in the *Perma Life* holding are equally applicable to the instant case.

> "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be

no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." 392 U.S. at 139.

While *Perma Life* involved a claim under Section 3 of the Clayton Act, the same reasoning is applicable where the claim is based on Section 1 of the Sherman Act. See *Fortner v. U.S. Steel*, 394 U.S. 495, 521 (Fortas, J., dissenting). Because the motivation of the buyer of the tied item under these circumstances is irrelevant, the presumption of economic power arising from the existence of the franchise trademark cannot be rebutted by reference to any absence of coercion outside the agreement or any supposed desire to obtain the tied Handy Andy franchise. See *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357, 360 (S.D.N.Y. 1973) and cases cited therein; *Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54, 62-63 (D. Ore. 1973). This Circuit has pointed out in *American Mfrs. Mut. Ins. Co. v. American B-P Theatres, Inc., supra*, 446 F.2d at 1137 that it is not decisive that the buyer found the "contract economically advantageous . . . since that is a necessary characteristic of most contracts including illegal ones."

In considering the relevance, under the antitrust laws, of motive and the presence or absence of overt coercion, it is significant that tying violations of the Sherman Act can be challenged not only by the buyer of the tied product, but also by competitors of the seller. *Warriner Hermetics Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir. 1972) was an action by a competitor against a franchisor, a manufacturer of compressors for refrigeration and air conditioning equipment. The plaintiff challenged as a tying violation the franchisor's contractually imposed requirement that its franchisees not obtain parts from sources other than the franchisor. The Fifth Circuit reversed judgment for the defendant because of incorrect jury instruction and held that this arrangement warranted jury instructions on the *per se* rule.

Warriner Hermetics was a suit by a competitor. The

court did not concern itself with whether coercion between the franchisor and the franchisee existed. The existence of the trademark used as a tying item was sufficient:

> "In summary, the Copeland trade-mark, like the Chicken Delight mark, is persuasive evidence of significant market leverage in the hands of Copeland. To this trademark Copeland has tied compressors rebuilt by authorized Copeland rebuilders and parts manufactured by Copeland." *Id.* at 1015-1016.

However, if the coercion requirement imposed in the instant case is valid, it necessarily follows that if suit had been brought by a competitor of Olsten's such as Manpower, that competitor would have to establish coercion between Olsten and Zessos as a prerequisite to the existence of an illegal tie-in. This illustrates the extreme lengths to which a coercion requirement would take the tying doctrine. Such coercion is either essential to the establishment of a tying arrangement or it is not. Any suggestion that there are two different standards for illegal tie-ins, one for suits by the buyer and one for suits by competitors, defies rationality and undermines effective enforcement of the antitrust laws.

The Supreme Court has repeatedly held by implication that overt coercion is not necessary to proof of an illegal tie-in. It has found tie-in sales to be unlawful where it was a matter of indifference to the buyer whether or not he bought the tied products from the defendant seller. In both *Northern Pacific* and *International Salt* the Court found tying arrangements to be unlawful even though the buyer was not required to purchase the tied product from the defendant if he could buy it on more favorable terms elsewhere, or if he chose not to buy the product at all. In *Fortner* the purchaser's president acknowledged that he accepted the tying condition because the financing terms (the tying product) were unusually and uniquely advantageous to him. 394 U.S. at 504. There was no evidence of any coercion to take the tied product.

In *Anderson v. Home Style Stores, Inc.*, 358 F. Supp. 253 (E.D.Pa. 1973) summary judgment was granted for plain-

tiff franchisees who successfully contended that credit was tied to their franchise for Home Style delicatessens. The court noted in words fully applicable to the present case:

> "It may be that the plaintiffs escape a bad bargain freely entered into. But the antitrust laws are not so much concerned with the freedom with which the bargain was entered as they are the effect of the bargain on those parties who are, in fact, if not in law, the real aggrieved parties, that is, the competitors of the restrainer of trade, and in the final analysis, the consumer, who must depend on the maintenance of such competition to keep profit margins low and prices down." 358 F. Supp. at 255-56.

In the immediate case, the court's emphasis on "unlawful" coercion protects the "restrainer of trade" while derogating the interests of the real parties intended to be protected by the Sherman Act, the "competitors" and the "consumer". The element adds nothing of substance to the preexisting tie-in principles applicable to this case and should be discarded on this appeal.

F. The illegal use of economic power is clearest when there is no essential relationship between the tying and the tied items.

The district court agreed with the plaintiffs' assertion that the "Handy Andy" and "Olsten's" franchise licenses were two separate products: "Moreover, Handy Andy was an entirely separate business, operating in a completely different market," 365 F. Supp. at 893. However, the court went on to hold that because the tying and the tied products are not "jointly necessary" a "long conceptual leap" is required to establish a tie-in. *Id.* This conclusion, for which no authority is cited, we respectfully submit is at variance with the reported cases.

1. The Tied Item Does Not Have to Have an "Essential Relationship" to the Tying Item.

There is no support in the case law for the district court's view in the instant case:

> "Neither was the Handy Andy license a product in the sense usual to tie-in cases. Generally the tying and

tied products are jointly necessary or useful to the buyer or his business, or are similar in character." 365 F. Supp. at 893.

The cases are clear that there is no requirement that the tied item have an essential relationship to the tying item. Thus, in *Northern Pacific* the rail services tied to the sale of land had no essential relationship to the land, nor were they "jointly necessary or useful to the buyer." Similarly, in *Fortner* there was no "necessary" relationship between credit and prefabricated houses. See also, *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971) (groceries, dairy products, leases, loans, and insurance agreements tied to one another).

Where there is no essential relationship between the tying item and the tied item, a *stronger* argument can be made that the tie-in has illegal effects in restraint of trade. The plaintiffs in the franchise tying cases of *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), cert. granted, 379 U.S. 885, 85 S. Ct. 158 (1964), cert. dismissed, 381 U.S. 125, 85 S. Ct. 1364 (1965), and *Siegel v. Chicken Delight, supra,* had to buy the tied items from someone. The court struck down the requirement in the *Siegel* franchise agreement that such purchase be made from the franchisor. But here, the lack of any essential relationship between the tying and the tied items serves only to underscore the illegal use of economic power. Where the two products are clearly separate, the tie-in is even less subject to the "reasonableness" defense.

2. One of the Elements of an Illegal Tying Arrangement is That the Products Are Distinct.

The district court in the instant case found as fact the separateness of the two franchises at issue. 365 F. Supp. 895. It further noted that "there was no necessary connection between the two", *Id.* at 893, and used this conclusion to buttress its ultimate determination that no tie-in existed. While a "connection" or dependency existing between the "tied" and "tying" items may be present in the standard franchise tying arrangement, for example sales of gasoline

and TBA, or food franchises and product ingredients, the classic tie-in pattern has involved two products not at all dependent or connected. The two tied franchises involved in the instant case are not properly analogized to the franchise and paper products in *Siegel v. Chicken Delight*, but rather to the functionally separate and distinct shoe making machines tied to each other in *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 455-56 (1921). A return to "first principles" reminds one that early tie-in cases did not require a mutually dependent or connected relationship between the items.[7] Thus, the separateness present in the instant case makes the tying even less defensible.

3. Failure to Allocate Purchase Price Between the Tying and the Tied Items Does Not Render a Tying Arrangement Legal.

The opinion below finds further support for its conclusion that no tie-in existed in its statement that Zessos did not explicitly purchase the Handy Andy franchise. 365 F. Supp. 893. Plaintiffs argue that both the original "front end" license fee and the continuing percentage of total billings constitute unabashed payments to Olsten. Further, there is no requirement that a purchase price be allocated between the tying and the tied item. In *U.S. v. Loew's Inc.*, 371 U.S. 38 (1962) the defendants engaged in "block booking" of feature motion pictures for television exhibition. Highly prized films were sold only in a package with inferior films. Although there was no allocation of purchase price between the desirable films and the undesirable films, the Court found no difficulty in voiding the block booking arrangement as an illegal tying arrangement.

Similarly, in *Siegel* the tying Chicken Delight franchise was not separately "purchased" at all. The franchisor recovered his profits from the sale of the tied items, certain packaging and wrapping materials. Although there had

[7] At some point the closeness of the relationship between the tied items becomes a justification for the arrangement. See *Osborn v. Sinclair Refining Company*, 286 F.2d 832, 840 (4th Cir. 1960); and *Beefy Trail, Inc. v. Beefy King International, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972).

been no "sale" of the tying product, this did not prevent the Court from determining that a tie-in existed.

In *Northern Pacific*, where preferential routing clauses were illegally tied to the sale or lease of Northern Pacific's large land holdings, the Court noted:

> "The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted." 356 U.S. at 8.

Similarly, in the instant case, the absence of a separate and distinct "sale price" of the Handy Andy license would, in view of the precedents, be irrelevant to the existence of the illegal tie.

G. Economic power can be "used" in many ways not involving overt coercion.

By focusing on overt "coercion", the district court has selected out *only one* of the ways in which economic power can be used by the franchisor to establish the illegal tie. However, the ways in which economic power can be "used" are numerous and subtle. Other ways in which economic power can be demonstrated without the presence of unlawful overt coercion are the use of a desirable or unique tying product as in *Loew's*, the use of a unique lower price for the tying item as in *Fortner*, and the use of unequal bargaining power by the franchisor, for example in *FTC v. Texaco*, 393 U.S. 223 (1968). Perhaps the best example of the use of economic power is found in the imposition of contract terms, which, even if unenforced, curtail the business decisions of the franchisee and foreclose competition in the unrelated market for the tied item. The binding effect of a seemingly legal and enforceable contract represents a form of "coercion" frequently encountered in business. If illegality is sought, the end result—a tying contract—should be more than sufficient.

1. Desirability of the Tying Product or Uniqueness of its Attributes.

Further support for the proposition that "unlawful coercion" is not a necessary element is found in *United States v. Loew's*, 371 U.S. 38 (1962), where the Supreme Court invalidated a scheme involving block booking of copyrighted feature motion pictures, and tying inferior films to more desirable films. Finding the requisite economic power in the more desirable films, the court held:

> "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." 372 U.S. at 45.

More recently, the Supreme Court has indicated that "uniqueness in its attributes" is not limited to copyrighted items, or even to items that derive economic power from the force of law. The requisite economic power can be demonstrated when the buyer chooses to purchase the tied item because of its desirable lower price. In *Fortner v. United States Steel*, 394 U.S. 495 (1969), the plaintiff was a developer whose tying claim had been dismissed on a motion for summary judgment as in the instant case. The developer claimed that the tying item was credit which unlike a trademark, patent or copyright was not subject to a presumption of economic power. The tied items were fabricated steel homes manufactured by United States Steel, the owner of the subsidiary credit corporation. In holding that sufficient economic power had been used, the court discussed the standards of economic power required for a tie-in to exist:

> "[D]espite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—can be forced to accept the higher price because of their stronger preferences for the product and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product." 394 U.S. at 503-04.

In *Fortner* the defendant was using its power over the tying item, advantageous credit terms, to influence the

business decisions of the purchaser. However, it would not be accurate to say that the defendant credit corporation overtly "coerced" the plaintiff Fortner. Rather it used the economic power, derived from its control over substantial amounts of capital, to couple bargain-rate credit which a businessman could not afford to pass up with the tied prefabricated homes.

The *Fortner* court discussed its rejection of the "market dominance" standard of *International Salt* and *Loew's* in these words:

> "These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. . . . [D]espite the freedom of some or many buyers from the seller's power, other buyers . . . can be forced to accept the higher price because of their stronger preferences for the product. . . ." 394 U.S. at 503-504.

Certainly in the instant case, the desirability and uniqueness of the "Olsten" trademark white collar franchise[8] available through no other source in itself constitutes the requisite economic power.[9] The exercise of this economic power resulted in a franchise contract which imposed the blue collar franchise, restricted the plaintiffs' business decisions, and foreclosed competition in the market for the tied item. This constitutes the "presence of (an) appreciable restraint on competition" not any less illegal under the antitrust laws whether further overt "coercion" is present or not.

2. Unequal Bargaining Power Between the Franchisee and the Franchisor.

[8] The defendant itself touts such desirability and uniqueness. E.g. see Olsten affidavit A72-A73; and its claims set forth at A321-A323.

[9] The rationale for this manifestation of economic power is set forth in *Fortner Enterprises v. U.S. Steel*, 394 U.S. 495, 505, fn. 2. and is fully applicable to the Olsten white collar trademark.

The unequal bargaining power between parties to the tying arrangement is evidence supporting the existence of economic power. Thus, for example, in *FTC v. Texaco*, 393 U.S. 223 (1968), the Court found that the exercise of economic power could be inferred, in part, because of the inequality between gas station franchisees and a major oil company. *Id.* at 226. See also *Shell Oil Co. v. FTC*, 360 F.2d 470, 487 (5th Cir. 1966).

In the instant case, the relationship was not between equals. By its own assertion, Olsten was a nationally recognized franchisor, and Zessos a franchisee with no experience whatsoever in franchising, or in employment services.[10] There certainly is a substantial basis for finding that the defendant, Olsten, had and exercised "dominant economic power". See *Texaco, supra*, at 226. No significant bargaining between the parties occurred during the negotiations for the franchise agreement. Where, as in the instant case, the business decisions of the franchisee with respect to entry into the market for the tied item were dictated by the agreement, "dominant economic power" is present and has been used.

3. The Existence of a Franchise Contract, Imposing a Tying Arrangement, Even if Unenforced, Represents the Exercise of the Economic Power of the Tying Item and Restricts the Business Decisions of the Franchisee.

In *International Salt Co. v. United States*, 332 U.S. 392 (1947), the defendants argued that their tying arrangements were inoffensive restraints because their lessees were allowed to buy the tied product, salt, from other suppliers when available at lower prices. The Supreme Court held, in spite of this escape clause, the mere existence of the contract terms had a restraining effect on competition:

> "A competitor would have to undercut [International's] price to have any hope of capturing the [tied] market, while [International] could hold that market by merely meeting competition. We do not think this concession

[10] Olsten affidavit, paragraph 14 at A74. See A197-A198 and A307.

relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision." 332 U.S. at 397.

In *Northern Pacific R.R. Co. v. United States,* 356 U.S. 1 (1958), leaseholds in real property were the tying items. The tying arrangement was embodied in a contract containing a preferential routing clause requiring purchasers to use Northern Pacific to ship all goods produced on the land. Even though the preferential routing clauses were subject to numerous exceptions, *inter alia* permitting the lessee or vendee to ship by competing carrier if its rates were lower, the contract itself was held to be a restraint of trade:

> "[T]he essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant." 356 U.S. at 12.

The lower courts as well have consistently rejected the argument that because a restrictive agreement is benignly enforced, it does not operate to restrain competition. In *Advance Business Systems v. SCM Corp.,* 415 F.2d 55 (4th Cir. 1969) defendant claimed that the clause in its rental contracts prohibiting use of supplies which might damage SCM's copying machines, the effect of which was to preclude the use of any non-SCM products, was not an illegal tie because no rental agreements were terminated because this clause was violated. *Id.* at 63, 64. The Court of Appeals disagreed:

> "The fact that an agreement is leniently administered, however, does not necessarily lessen, and certainly does not eliminate, its restrictive effect on competition. The overhanging threat of enforcement is ever present, and implied agreements, like express contracts, may be "held over the heads of vendees [and] deny defendant's competitors access to the fenced-off market on the same terms as the defendant." *Advance Business Systems and Supply Co. v. SCM Corp.,* 415 F.2d 55, 64 (4th Cir. 1969).

The Fourth Circuit pointed out that coercion *or* an illegal agreement (even if leniently enforced) can impose an illegal tying arrangement:

> "[t]he tying arangement is no less invalid when it is written into a formal contract than when it is imposed by means of coercive or fraudulent practices." 415 F.2d at 66.

The plaintiffs submit, contrary to the district court's opinion, that lack of enforcement in the instant case does not legitimize an otherwise illegal tie. The existence of the prohibited contract terms is sufficient to prove illegality. See also, *United Shoe Mach. v. United States*, 258 U.S. 451, 458 (1921).

A similar defense of "abandonment" or lack of enforcement was raised in *Chock Full O' Nuts Corp., Inc.*, FTC Opinion dated October 2, 1973, at CCH Trade Reg. Reports ¶20,441, in the face of a Federal Trade Commission claim of price fixing. The Commission rejected this attempt at avoidance:

> "The mere existence of a duly executed, binding contract to fix prices between competitors . . . however lightly its obligations may be regarded at various times by various parties, is inevitably a threat to competition. Whatever current practice may be, there is always some danger that one of the parties will seek enforcement of the agreement, or that the other will feel obliged to adhere." *Id.* at 20,338, 20,339.

There exists no persuasive reason for adopting a different rule in the tying area. The continuing threat that Olsten would at any time enforce the requirements of paragraph 2 of the franchise contract is a sufficient showing of economic power.

The court below considered the "crucial point" to be that "there is no indication whatever that Zessos attempted to free himself from the supposed burden of having to open a Handy Andy office." 365 F. Supp. at 894. The supposed absence of "unlawful coercion" complements this point. The plaintiffs submit that the existence and language of this franchise contract, coupled with the inequality of the

parties, and the presumption of economic power from the trademark and the market foreclosure which necessarily followed can lead to no other conclusion than that the elements of an illegal tie-in have been met and that the plaintiffs were subject to illegal restraints perpetrated by the defendant.

III

THE COURT'S CONCLUSION AS A MATTER OF LAW THAT THE FRANCHISE CONTRACT DID NOT IMPOSE AN OBLIGATION ON PLAINTIFFS TO OPERATE THE TIED FRANCHISE DISREGARDS BASIC SUMMARY JUDGMENT PRINCIPLES AND CONSTITUTES REVERSIBLE ERROR.

A. A fair reading of the contract terms disputed at a minimum raises a question of fact not resolvable by summary judgment in favor of the defendant.

In considering the cross-motions for summary judgment below the district court examined the franchise contract. Of particular relevance was paragraph 2 of the agreement:

> "The grant of the license hereunder includes the right of the LICENSEE to use the trademark and name HANDY ANDY LABOR. All 'blue collar' personnel *shall* be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR commencing six (6) months from the date hereof. For the purposes of standards and rate of franchise fee, the total of all billings from whatever source *shall* be included. (Emphasis added)

In part II of the opinion below, the court weighed plaintiff's motion for summary judgment. Pursuant to the rule that the proof be viewed in the light most favorable to the non-moving party, the court considered the language of paragraph 2 and, stressing the first sentence, concluded that plaintiff "simply received the *right* to use the Handy-Andy trademark along with the Olsten name." 365 F. Supp. at 893. This was apparently substantiated in the court's mind

by the further and erroneous conclusion that "defendant earned no income from that grant."[11] *Id.* The court further disputed plaintiff's claim that the contract terms were reasonably interpreted as requiring the establishment of a Handy Andy operation and that Olsten invoked this language to pressure Zessos. *Id.*, 894, 895. Upon such conclusions, the court denied the plaintiffs' motion for summary judgment.

In part III of its opinion, the court considered and granted defendant's motion for summary judgment. In doing so, it considered some of the same questions presented by plaintiff's motion, and again resolved them in defendant's favor. For example, the court places the same interpretation on paragraph 2 of the franchise contract: "The key provision . . . simply granted the plaintiff the right to use the Handy Andy trademark". *Id.* at 895. Again the court ignored the second, imperative sentence in the contract requiring the plaintiff to supply all blue collar personnel through a Handy Andy operation. It is apparent that the defendant's motion has not been subjected to the same rigorous test as that of the plaintiffs. In this regard, the requirements of Rule 56 have not been complied with:

> ". . . in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden." 6 Moore's Federal Practice, ¶56.15[3], p. 2337-2338.

B. Paragraph 2 of the contract was not construed as a matter of law; summary judgment was therefore improperly entered.

The court below relied on *Nat'l Utility Service, Inc. v. Whirlpool Corp.*, 325 F.2d 779 (2d Cir. 1963) for authority to construe the contract as a matter of law, 365 F. Supp. 896. This reliance is misplaced. *National Utility* holds that

[11] Erroneous because the contract provided in paragraphs 2 and 4 that the defendant receive 5% of all Handy Andy gross billings. (A20-A21)

"The construction of a contract is for the court when its terms are unambiguous and there are no extrinsic facts to affect its construction." 325 F.2d at 781. The court below relied heavily on evidence extrinsic to the contract to assist in its construction and this evidence clearly involved questions of fact. The discussion on page 895 of the opinion is replete with references to circumstances surrounding the contract and its implementation, as evidenced by footnotes 13 through 16 appearing therein. These circumstances were relied upon to conclude that:

> "Construing as a matter of law the plain language of the contract, I hold that Zessos was in no way obligated to enter the blue collar industry. . ." (Citation omitted) 365 F. Supp. at 896.

This does not constitute construction of the contract as a matter of law independent of extrinsic circumstances.

The plaintiffs further submit that in considering the defendant's motion for summary judgment, if it does not accept the mandatory nature of the word "shall," the court is at a minimum obliged to acknowledge that the language of paragraph 2 is ambiguous — that it might or might not represent an affirmative requirement concerning the operation of a Handy Andy franchise. The district court has accepted the defendant's statement of its intent while ignoring the plaintiffs. 365 F. Supp. at 895, ftn. 15. This constitutes error: such a circumstance presents a question of fact for the jury and requires denial of a motion for summary judgment. See *Oil Trading Associates, Inc. v. Texas City Refining, Inc.*, 201 F. Supp. 846, 849 (S.D.N.Y. 1962) ("Where a written agreement is ambiguous the intent of the parties who executed it is important, and if the intent is disputed a genuine issue of material fact exists which cannot be determined upon a motion for summary judgment.") Furthermore, summary judgment is inappropriate where the contract by itself is fairly susceptible of two interpretations, without regard to consideration of the parties' intent. *Aetna Casualty v. Giesow*, 412 F.2d 468, 471 (2d Cir. 1969).

IV

SUMMARY JUDGMENT DISMISSING A TYING CLAIM IS INAPPROPRIATE WHERE THE SOLE GROUND FOR THE DISMISSAL IS THAT THE BUYER DID NOT ESTABLISH ACTUAL COERCION BY THE SELLER OUTSIDE THE CONTRACT.

Should this Court hold that overt coercion is required in the relations between the parties before a tying violation of the Sherman Act can be established, clear grounds exist for reversing the district court's dismissal of the Fifth Count.

"Coercion" by definition involves the motives of the buyer of the tied item. Summary judgment is inappropriate in a tying claim where inquiry into motive is necessary. *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962). On its face the opinion of the court below discloses serious disputes as to the motives underlying the conduct of the parties. Finally, even if the plaintiffs' motion for summary judgment was properly denied they are entitled to a trial on the factual issues as to whether an unlawful restraint of trade operates between the parties, particularly in light of their claim for a jury trial.

A. An inquiry into "coercion" requires consideration of the motive and intent underlying the parties' conduct; thus summary judgment is inappropriate.

1. The Definition of Coercion in the Tying Context Necessarily Includes a Conclusion as to the Motivations of the Buyer of the Tied Item.

Assuming *arguendo* that the "use" of economic power must be established and that such use may only be manifested by unlawful coercion, an examination of the term "coercion" mandates an inquiry into the motives of the buyer of the tied item.

"Coercion" is defined in Black's Law Dictionary *inter alia* as follows:

> "It may be actual, direct or positive, as where physical force is used to compel (an) act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to (an) other to do what his

> free will would refuse." Black's Law Dictionary, 4th Ed. (1951) at 324.

Whether one party is constrained by subjugation to another to do what his free will would otherwise refuse involves an inquiry into the volitions and attitudes of the party allegedly "coerced", and necessitates some conclusion about the effect of external forces on his free will.

Federal courts have recognized that there is a continuum ranging from persuasion on the one extreme to coercion on the other. See e.g. *Lah v. Shell Oil*, 50 F.R.D. 198 (S.D. Ohio, 1970). The Supreme Court has noted the need to delineate to the trier of fact the importance of the gradations from coercion to argument, and persuasion to exposition. *Ford Motor Co. v. U.S.*, 335 U.S. 303 (1943). The presence of "coercion" represents an issue of fact requiring a full opportunity to explore the operative facts and observe the demeanor of the parties. See, for example *Amer. Mfrs. Mut. Co. v. Amer. B-P Theatres*, 388 F.2d 272, 283 (1967). At this early stage in the litigation summary judgment is completely inappropriate on an issue of fact such as coercion. *Broadcast Music, Inc. v. CBS*, 55 F.R.D. 292 (S.D. N.Y. 1972) at 96, *Skouras Theatres Corp. v. Radio-Keith Orpheum Corp.*, 58 F.R.D. 357 (S.D. N.Y. 1973), *Hammond Ford, Inc. v. Ford Motor Co.*, 39 F.R.D. 604, 606 (S.D. N.Y. 1966), *Dobbins v. Kawasaki Motors Corp.*, 362 F. Supp. 54, 56 (D. Ore. 1973).

2. Summary Judgment in a Tying Claim on the Sole Ground of Coercion is Inappropriate.

Because it is so difficult to discern the complex and often conflicting motives of individuals, the Supreme Court has sharply limited the summary judgment remedy in private antitrust litigation where motive and intent are determinative. In *Poller v. Columbia Broadcasting Systems*, a case with a posture similar to the instant case at the district court level, the Supreme Court held:

> "It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that it is quite clear what the truth is. Cer-

tainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgement in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." 368 U.S. at 472, 473.

Poller is not the only Supreme Court case to have recognized the importance of a trial by jury when issues of motivation are present in antitrust litigation. See *e.g. Ford Motor Co. v. U.S.*, 335 U.S. 303 (1948). This Circuit has followed this principle. In *American Manufacturers* this Court originally reversed summary judgment for the defendant and remanded for trial on the issues of motive and intent *even though* the trial was to be before a judge rather than a jury. 388 F.2d 272 (1967). It is especially important to be cautious in granting summary judgment against parties, such as the plaintiffs, which have demanded a jury trial. *Cameron v. Vancouver Plywood Corp.*, 266 F.2d 535, 540 (9th Cir. 1959).

In none of the "coercion" cases relied on by the district court was summary judgment granted for defendants on the basis of mere litigation affidavits. The plaintiffs submit, under the *Poller* doctrine, that it was error for the court below to deny the plaintiffs their day in court.

B. Even apart from the POLLER rule, the district court's opinion on its face refers to improper coercion of Zessos by the defendant.[12]

[12] This Court granted the defendant's motion to amend and limit the statement of issue contained in appellants' Designation of Parts of Record Intended to be included in the Appendix to the statement of controlling question of law presented in Appellants' petition for leave to appeal. It is uncertain therefore whether this Court intends to con-

The court below held that no material issue of fact was presented and that there was "no evidence whatsoever" permitting an inference that Zessos was improperly coerced or compelled to open a Handy Andy franchise. As a matter of law, it ruled that the facts of this case did not reveal improper coercion between the parties.[13] While the plaintiffs have asserted that the concept of coercion as employed by the district court involves a major element of motive and intent and is thus not an appropriate basis for summary judgment, nevertheless, the court's opinion contains numerous references to unresolved questions of motivation and intent. On a motion for summary judgment, the party seeking the judgment has the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party. *Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970). When disputes as to issues of fact exist to the point where they are reflected in the court's ruling, the moving party has not met his burden and summary judgment should be denied.

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sider in this appeal whether the affidavits and other documents submitted with respect to the cross-motions for partial summary judgment as to the Fifth Count present material factual disputes. However, as two recent Third Circuit cases make clear, while it is the controlling question of law which makes the partial summary judgment granted below appealable under 28 U.S.C. § 1292(b), "the Court of Appeals is instructed to decide the appeal, not merely the question making t[he] order appealable." *Katz v. Carte Blanche*, —— F.2d —— (3rd Ci[r.] 1974). BNA Trade Reg. Rep. (April 19, 1974) and *Johnson v. Al[]dredge*, 488 F.2d 820, 822-823 (3rd Cir. 1973).

[13] The district court held that the *Poller* rule is inoperative when it is plain that the allegedly unlawful practice simply did not exist. As support for this proposition, the court referred to *Goosby v. Osser*, 409 U.S. 512. *Goosby* stands for the *opposite* proposition. There the Supreme Court reversed dismissal of a class action by inmates of Philadelphia county prisons seeking voting rights. The lower courts had held that no case and controversy was presented because some of the defendants (Commonwealth of Pennsylvania officials) conceded the point the plaintiffs sought to establish. Reversing this holding, the Supreme Court held that there was presented a case or controversy and ordered the empanelment of a three judge court, because municipal defendants still opposed the plaintiff claims. It is unclear why the district court found this case to be authority undermining the *Poller* rule, even as a "Cf."

For example, the extract of the Zessos affidavit, set forth in the district court opinion, states:

> "Although I did not for business reasons want to open a Handy Andy office during the time period 1968-69, I was told by Mr. Olsten that I must do so because it was in my contract . . ." 365 F. Supp. at 894.

Paragraph 2 of the 1965 franchise agreement reads in pertinent part:

> ". . . All 'blue collar' personnel shall be supplied by a division of the LICENSEE designated as HANDY ANDY LABOR commencing six (6) months from the date hereof." *Id.* at 890.

In spite of the recognition given the contract and affidavit, the court concluded,

> "Neither the contract nor the relations between the parties revealed in the documents accompanying their motions suggests that the defendant pressured Zessos to begin the Handy Andy operation." *Id.* at 895.

While a jury might agree with the district court's conclusion concerning the motives of the plaintiff, it is at least equally possible that a jury would perceive his motives differently. In view of the requirements of Rule 56, F.R.C.P. and the strong policy favoring jury trials and the opportunity to consider demeanor evidence where motive and intent are operative, *Poller, supra,* it was error for the court not to consider the evidence in the light most favorable to the plaintiffs.

The court made similar judgments on motive and intent when it concluded:

> "What emerges from the evidence is a picture of a businessman who waited until he thought, mistakenly, that the right time had come for him to venture into a new field." *Id.* at 895.

It thus rejected out of hand Mr. Zessos' statement in paragraph 12 of his affidavit that he *did not* want to open a Handy Andy operation during the 1968-69 period. (A308)

In footnote 15 of its opinion, the court recognized that Mr. Zessos and his then attorney, John Poulos, interpreted the 1965 franchise agreement as imposing a six month dead-

line for the opening of a Handy Andy. 365 F. Supp. at 895. Mr. Zessos conveyed to Olsten, and to Olsten's attorney, Robert Helweil, his belief that the franchise agreement *required* him to open a Handy Andy operation.[14] (365 F. Supp. at 894, fn. 12, A82-A84). Thus it can be seen that from Mr. Zessos' perspective, as disclosed on the face of the court's opinion, the Handy Andy franchise—the tied item—was a required element of his franchise agreement with Olsten. In finding that the language of the six-month limitation in the franchise agreement was *not* a requirement that Mr. Zessos open a Handy Andy franchise, the district court relied solely on the Olsten affidavit. 365 F. Supp. at 895, fn. 15. The court disregarded the requirement that on a motion for summary judgment the moving party's affidavits must be read, and any inferences resolved, in the light most favorable to the opposing party. To rely on the moving party's controverted affidavits prepared after litigation has begun is to violate one of the basic principles of Rule 56, F.R.C.P.

Paragraph 12 of the Zessos affidavit, read most favorably to the plaintiffs as the non-moving party in this instance, also indicates that Mr. Zessos did *not* think that he could make more money in the blue collar Handy Andy business. (A308) On the face of the court's opinion, the conclusion certainly *is* avoidable that Mr. Zessos considered Handy Andy to be "just another area that we could earn quite a bit of income . . " 365 F. Supp. 895. To the contrary, the proper conclusion may very well be that he was coerced.

C. The plaintiffs are entitled to prove either a per se violation or a restraint of trade under the general standards of the Sherman Act.

In *Fortner v. U.S. Steel Corp.*, 394 U.S. 495, the Supreme Court noted a "preliminary error" before reversing the district court's grant of summary judgment for defendants.

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[14] In spite of the franchisor-franchisee relationship, characterized by some commentators as a fiduciary one [see Brown, Franchising—A Fiduciary Relationship, 49 Tex. L. Rev. 650 (1971)], Olsten and its attorney did nothing to question this fundamental and critical understanding until *after* the initiation of the instant litigation.

The Court found that the *Northern Pacific* prerequisites for a per se tying violation of the Sherman Act—economic power and a not insubstantial effect on interstate commerce—did not exhaust the plaintiff's possible claims under the Sherman act.

> On the contrary, these standards are necessary only to bring into play the doctrine of *per se* illegality. Where the standards were found satisfied in *Northern Pacific* and in *International Salt Co. v. United States*, 332 U.S. 392 (1947) this Court approved summary judgment *against* the defendants but by no means implied that inability to satisfy these standards would be fatal to a plaintiff's case. A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved that the general standards of the Sherman Act have been violated. Accordingly, even if we could agree with the District Court that the *Northern Pacific* standards were not satisfied here, the summary judgment against petitioners still could not be entered without further examination of petitioner's general allegations that respondents conspired together for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses. 394 U.S. at 499-500 [emphasis by the Court]

Paragraph 40 of the plaintiffs' complaint alleges that the defendant has acted "to restrain competition in the blue collar franchise market." (A15) This claim raises a question of fact not disposed of by the defendant's motion for summary judgment or by its affidavits. The court below did not rule on this issue. Thus the plaintiffs retain the right to present evidence of a restraint of trade under the more general standards of the Sherman Act. A similar situation was presented in *Penn Galvanizing Co. v. Lukens Steel Co.*, 59 F.R.D. 74 (E.D. Pa. 1973) where the court dismissed defendant's motion for summary judgment directed against Sherman Act tie-in claims concluding:

> "For even if . . . the allegations [of the complaint] do not constitute a 'classical tie-in' situation, they clearly allege an unreasonable restraint of trade (Section 1) and an attempt to monopolize (Section 2). The

only effect of alleging a 'classical tie-in' is that the plaintiff would establish a 'per se' violation which would preclude the 'reasonableness' of its actions. See *Northern Pacific* . . . So that even if plaintiff's allegations do not establish a 'classical tie-in,' they do, if proved, establish restraint of trade. Moreover, the plaintiff has the right to prove that such restraint was 'unreasonable'. Moreover, the issue of 'unreasonableness' is clearly a question of fact which must be resolved at trial." 59 F.R.D. at 83.

CONCLUSION

When a corporation with operations nationwide signs up an individual with no prior entrepreneurial experience to operate its franchise in one field; and, in this same contract, requires him, if he is to do business in a *second* distinct field, to do so only as its franchisee, a tying arrangement exists. When the additional elements of "economic power" and "a not insubstantial amount of interstate commerce in the tied item is affected" are present, that tying arrangement has violated the antitrust laws of the United States. The Olsten Corporation has done exactly this, and should not be permitted to evade the sanctions which the law provides as a deterrent to such conduct.

The plaintiffs request that the judgment of the Court below dismissing Count Five be reversed and remanded. The plaintiffs further request that this Court consider including in its order to remand instructions as to further consideration by the District Court of the plaintiffs' Motion for Partial Summary Judgment as to Count Five.

Respectfully submitted,

Plaintiffs-Appellants
By Ralph C. Dixon, Esq.
Philip S. Walker, Esq.
of Day, Berry & Howard
1 Constitution Plaza
Hartford, Connecticut
Their Attorneys

On the brief:
Augustus R. Southworth III, Esq.